

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

CINDY DELL,

Plaintiff,

**1:11-cv-1034
(GLS)**

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:

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2nd Floor
Albany, NY 12210

LOUISE MARIE TARANTINO,
ESQ.

FOR THE DEFENDANT:

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Gary L. Sharpe
Chief Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiff Cindy Dell challenges the Commissioner of Social Security's denial of her claim for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI), seeking judicial review under 42 U.S.C. §§ 405(g) and 1383(c)(3). (See Compl., Dkt. No. 1.) Currently pending is the Commissioner's motion to remand the case for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). (See Dkt. No. 18.) For the reasons that follow, the Commissioner's motion is granted.

II. Background

In February and April 2008, Dell who suffers from, among other things, migraines and anxiety disorder, filed applications for DIB and SSI under the Social Security Act ("the Act"), alleging disability since April 2, 2006. (See Tr.¹ 13, 94-105.) After her applications were denied, Dell requested a hearing before an Administrative Law Judge (ALJ), which was held on January 26, 2010. (See *id.* at 27-44, 48-53, 56-57.) On February 26, 2010, the ALJ issued a decision denying the requested benefits, which

¹ Page references preceded by "Tr." are to the Administrative Transcript. (See Dkt. No. 8.)

became the Commissioner's final determination upon the Social Security Administration Appeals Council's denial of review. (See Tr. at 86-93.)

Dell commenced the present action by filing her Complaint on August 30, 2011, wherein she sought review of the Commissioner's determination. (See *generally* Compl.) The Commissioner filed an answer and a certified copy of the administrative transcript. (See Dkt. Nos. 7, 8.) Each party, seeking judgment on the pleadings, filed a brief. (See Dkt. Nos. 12, 18.)

IV. Facts

The court adopts the parties' undisputed factual recitations. (See Dkt. No. 12 at 2-15; Dkt. No. 18 at 1-2.)

III. Discussion

The Commissioner now moves to have this action remanded for a rehearing pursuant to the fourth sentence of 42 U.S.C. § 405(g), asserting that the ALJ erred in weighing medical opinion evidence and determining Dell's residual functional capacity. (See Dkt. No. 18 at 2-6.) Dell does not oppose the motion, and agrees that remand is appropriate. (See Dkt. No. 21 at 1.) She requests, however, that this court limit the scope of remand. (See *id.* at 1-4.) While her appeal of the ALJ's unfavorable decision was pending, Dell filed another application for disability benefits. (See *id.* at 1-

2.) In a revised determination issued in May 2012, the Commissioner approved that application, finding a disability onset date of February 27, 2010, the date after the ALJ's denial of her first set of applications. (See Tr. at 7-26; Dkt. No. 21-1 at 1-2.) Dell now seeks an order limiting the scope of remand to the question of her disability prior to February 27, 2010. (See Dkt. No. 21 at 1-4.)

Notably, 20 C.F.R. §§ 404.987(b) and 416.1487(b) provide that the Commissioner may reopen and revise a final determination or decision on his own initiative. Specifically, the Commissioner may reopen a determination or decision within twelve months of the date of the notice of the initial determination "for any reason," within four years of the date of the notice of the initial determination for "good cause," or at any time if certain conditions are present. 20 C.F.R. §§ 404.988(a)-(c), 416.1488(a)-(c). Here, it appears that Dell seeks to prevent the Commissioner from reopening her second claim for benefits and consolidating it with her first claim upon remand. See *Davis v. Astrue*, No. 10-cv-404-PB, 2011 WL 5006936, at *1-2 (D.N.H. Oct. 20, 2011). Given that no appeal from her second claim has been taken, "[t]he court lacks jurisdiction over the subsequent award of benefits." *Encarnación v. Astrue*, 724 F. Supp. 2d

243, 245 (D.P.R. 2010); see *Baker v. Sullivan*, 880 F.2d 319, 320-21 (11th Cir. 1989); *Gay v. Astrue*, No. CA 07-403 M, 2008 WL 2004228, at *1 n.1 (D.R.I. May 8, 2008). Accordingly, Dell's request for an order limiting the scope of review on remand to the question of disability prior to February 27, 2010 must be denied. Indeed, the court does not have jurisdiction to either authorize or preclude the Commissioner from reopening Dell's second claim for benefits. See *Davis*, 2011 WL 5006936, at *2.

IV. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the Commissioner's motion to remand pursuant to the fourth sentence of § 405(g) (Dkt. No 18) is **GRANTED**.

IT IS SO ORDERED.

November 21, 2012
Albany, New York


Gary L. Sharpe
Chief Judge
U.S. District Court